IN THE

Supreme Court of the United States

October Term, 1967

No. 23

PATRICIA WALDRON, as Executrix of the Last Will and Testament of GERALD B. WALDRON, Deceased,
Petitioner,

v.

CITIES SERVICE CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

WILLIAM E. KELLY
DAVID ORLIN
PREBEN JENSEN
ALAN R. WENTZEL
Counsel for Petitioner

Of Counsel:
CASEY, LANE & MITTENDORF
26 Broadway
New York, New York 10004

Counsel of Record:
WILLIAM E. KELLY
26 Broadway
New York, New York 10004

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CITATIONS

ABBREVIATIONS

Tr. Vol. Transcript of Record volume and page of portions of record printed pursuant to Supreme Court Rule 26

R. Record page of filed but unprinted record

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Opinions Below

The opinion of the court of appeals (Tr. Vol. III, 173-176) is reported at 361 F.2d 671. The opinion of the district court of September 8, 1965 (Tr. Vol. I, 5-17a) is reported at 38 F.R.D. 170; the opinion of June 23, 1964 (*id.* at 21-68a), is reported at 231 F.Supp. 74; the opinion of March 30, 1961 (*id.* at 70-72a), is unreported.

Jurisdiction

The judgment of the court of appeals was entered on June 6, 1966 (Tr. Vol. III, 177). On August 29, 1966, by order of Mr. Justice Harlan, the time within which to file a petition for a writ of certiorari was extended to November 3, 1966 (*id.* at 178). The petition was filed November 3, 1966, and was granted January 16, 1967 (*id.* at 179). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. In a private antitrust action may plaintiff be stayed from all discovery while he and each of his associates are exhaustively examined by the defendants, one after the other, and the court then accord him only a limited discovery of the moving defendant in aid of his opposition to the latter's motion for summary judgment?

2. In such an action, where the only source of direct evidence of the conspiracy rests in defendants' files, when one of the defendants moves for summary judgment under rule 56(b), Fed. R. Civ. P., is the burden upon the defendant to show that there is no genuine issue as to any material fact for trial under rule 56(c) or is the burden upon the plaintiff to show that there is such an issue under rule 56(e)?

3. Did plaintiff, in fact, sustain the burden of showing genuine issues for trial on the limited record at his disposal?

Statute Involved

The statutory provision involved is rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C. App. following §2718. Rule 56 is printed in Appendix A, *infra*, pp. 66-68.

Statement of the Case

Preliminary Statement

This is an antitrust action brought pursuant to section 4 of the Clayton Act, 15 U.S.C. §15, to recover $109,260,000 as treble damages sustained by plaintiff* as the result of his inability to market oil under a contract which he had secured from the Iranian Government in 1952. Plaintiff claims damages because defendants' conspiracy to boycott all dealings in Iranian oil following nationalization of Iran's oil industry in 1951 prevented him from selling any oil under his contract.

The present appeal is to review the entry of summary judgment in favor of one defendant, Cities Service Co. The defendants named in the original complaint, filed June 11, 1956, are six major international oil companies: British Petroleum Co., Ltd. (formerly Anglo-Iranian Oil Company, which held the concession for Iranian oil prior to nationalization), Socony Mobil Oil Co., Inc., Standard Oil Co. of California, Standard Oil Co. (New Jersey), Texaco Inc., Gulf Oil Corp. (each of which also held substantial oil concessions in the Middle East), and the respondent, Cities Service Co., which, plaintiff alleges, joined the conspiracy to boycott Iranian oil (Tr. Vol. II, 45-65a):

* Plaintiff Gerald B. Waldron died after suit was commenced and his widow as executrix has been substituted for him as plaintiff (Tr. Vol. IV, 291). We shall refer to plaintiff as if the decedent were still alive.

Facts

The oil industry and properties of Iran were nationalized effective May 1, 1951. Prior to nationalization, Iran, one of the leading oil-producing countries in the world, had been the principal source of oil for the Anglo-Iranian Oil Company ("A.I.O.C."), the sole operator of the country's oil industry for many years. SHWADRAN, THE MIDDLE EAST, OIL AND THE GREAT POWERS 161 (2d ed. 1959).

Oil production in other Middle Eastern countries, such as Iraq, Saudi Arabia and Kuwait, was also held under concessions, almost exclusively by the international oil companies (each is named as a defendant or co-conspirator in this action) which made up the international petroleum cartel. FEDERAL TRADE COMMISSION STAFF REPORT, THE INTERNATIONAL PETROLEUM CARTEL (1952) ("F.T.C. REPORT").* Anticompetitive agreements covering production and marketing of Middle Eastern oil had been made by and between the cartel members during their long monopoly. F.T.C. REPORT 268-74. When nationalization occurred, therefore, two major problems presented themselves, not only to A.I.O.C. but to the remaining members of the Middle Eastern oil cartel as well: first, alternative sources of oil had to be

* The cartel was the subject of an investigation by the staff of the Federal Trade Commission in 1952. F.T.C. REPORT. Later, the Government brought a civil action to break up the cartel, *United States* v. *Standard Oil Co. (New Jersey), et al.*, Civil Action No. 86-27 (S.D.N.Y.), resulting, to date, in the entry of consent decrees against three of the defendants. *United States* v. *Standard Oil Co. (New Jersey)*, 1960 TRADE CAS. ¶69,849 (S.D.N.Y. 1960); *United States* v. *Gulf Oil Corp.*, 1960 TRADE CAS. ¶69,851 (S.D.N.Y. 1960); *United States* v. *Standard Oil Co. (New Jersey) (Texaco, Inc.)*, 1963 TRADE CAS. ¶70,819 (S.D.N.Y. 1963).

found pending a settlement with Iran so that A.I.O.C. could continue to supply its extensive marketing structure; second, Iran had to be made an example of so that other countries would not also nationalize their oil industries.

In the circumstances, the British (A.I.O.C. was 51% owned by the British Government) adopted a policy of starving the Iranians into submission by placing an embargo on British goods destined for Iran and boycotting Iranian oil. SHWADRAN, *supra* at 22, 125, 149-50. The other defendants respected A.I.O.C.'s position that Iranian oil was "stolen" property by refusing to purchase it (Tr. Vol. I, 97a). To replace Iranian oil in its markets, A.I.O.C. turned to Kuwait, where it shared the concession with Gulf Oil Corp. O'CONNOR, THE EMPIRE OF OIL 286 (1955).

On May 25, 1952, plaintiff, acting under his business name, Consolidated Brokerage, secured a contract for the purchase of Iranian oil from the National Iranian Oil Company, the entity designated to operate all Iranian oil properties after nationalization (Tr. Vol. I, 90-92a). This contract, signed by plaintiff in Tehran, gave Consolidated the right to buy 15 million metric tons of crude oil or refined products over a five-year period at $8.75 per ton of crude oil for the first three million tons and at the Persian Gulf posted price less $2.00 per ton for the remaining 12 million tons (*ibid.*). The posted price at that time was $12.89 per ton (R. 23). No payment was required in advance. Under the contract, National Iranian Oil Company agreed not to offer its crude oil or refined products to other buyers in the United States market and, if any such buyer made an offer to it, the Iranians agreed to give Consolidated the first opportunity to supply the prospective purchaser (Tr. Vol. I, 91-92a). Thus, plaintiff was the person

to whom prospective buyers of Iranian oil in the United States would have to turn.

In securing the contract and, later, in attempting to sell oil under it, plaintiff and his associate, Richard S. Nelson, neither of whom had had prior experience in the oil business, sought advice and assistance from James A. Bentley, James E. Zoes and Raymond A. Carter. Bentley was a business consultant and the principal stockholder and president of Oil Recovery Corp., which had a new process for increasing the speed and efficiency of secondary oil recovery (Tr. Vol. I, 89a). Zoes was engaged in the sale of pipe to the oil industry and had contacts in the tanker business (*id.* at 92a; R. 9052-53). Carter was an independent oil broker. He had previously been employed for many years by Cities Service Co. and was well acquainted with W. Alton Jones, Cities' chief executive officer, and with other top officials at Cities (Tr. Vol. I, 93a; R. 10488).

As soon as the contract was signed, plaintiff's group communicated with numerous companies—large and small—in an effort to sell the oil. Several major companies, including some of the defendants, were contacted and offered oil under plaintiff's contract through H. L. Williford, an executive of Hunt Oil Co., who had been contacted by Bentley and Zoes (Tr. Vol. I, 96-97a). Each of these companies refused to deal in Iranian oil (*id.* at 97a).

Zoes contacted several small marketers of oil in the New York area. One company, Sterns, Inc., after indicating an interest in purchasing 15 million barrels of No. 2 fuel oil, subsequently informed Zoes that it depended upon major oil companies for its supplies and that it could not expect to do business with the majors if it dealt in Iranian oil (Tr. Vol. I, 93-94a). Another marketer, Coastal Oil

Company, after first discussing the purchase of five million barrels of petroleum products, decided that its close working relationship with its supplier, Standard Oil Co. (New Jersey), made Iranian oil too hot to handle (Tr. Vol. I, 94-95a). The officials of a third company, Connoil Corp., told Zoes they wanted to purchase one million barrels each of kerosene, No. 2 oil, No. 5 oil and Bunker C fuel oil, on a long-term basis. But then Connoil's president decided that the purchase was not worth alienating its suppliers, the major companies. Connoil officials expressed their fear of the major companies and said they knew of the majors' opposition to any movement of Iranian oil (Tr. Vol. I, 95-96a).

The most promising initial prospect was First National Oil Company of Long Island City, New York, a company which had purchased oil from Mexico following nationalization in that country. However, negotiations eventually fell through when the president of the company admitted he was fearful that, if he dealt in Iranian oil, his supplies would be cut off, as they had been when the company had purchased nationalized Mexican oil (Tr. Vol. I, 97-98a).

Still other prospects were pursued, but in each case the purchaser refused to buy Iranian oil, regardless of plaintiff's advantageous prices. Most often the ground for refusal was that the purchaser was unwilling to deal in Iranian oil because of the threat of reprisal from the cartel companies, upon which he depended for long-range supplies of oil (Tr. Vol. I, 99-101a). One oil company executive said to Zoes, "Are you kidding, trying to bring this oil here?" (Tr. Vol. I, 100a.) Another wrote to plaintiff that, "I am very disappointed to inform you that Kerr-

McGee is not interested in the Iranian crude. The threat of reprisals is too great." (Tr. Vol. I, 101a.)

In mid-June 1952, plaintiff applied to the Chase National Bank for a letter of credit required to be posted under the contract (R. 1875). The issuance of the letter of credit was approved by the Bank, and plaintiff was in the act of signing the necessary papers at the Bank's Grand Central branch office when instructions to deny the letter of credit were telephoned to the branch manager from the main office (R. 1877). When plaintiff and the branch manager demanded an explanation, they were told by a Chase vice-president that the Bank had preferred clients who were large oil companies, that it would not be in the interest of these clients to issue the letter of credit, and that he "was acting on instructions of Colonel Drake." (R. 1881.) Colonel J. F. Drake was, at the time, a director of the Chase National Bank and chairman of the board of Gulf Oil Corp. 1952-53 WHO'S WHO IN AMERICA 676-77 (1952).

After the initial efforts to sell Iranian oil proved fruitless, Carter approached Cities Service (Tr. Vol. I, 101a). Although a substantial company, Cities was at the mercy of the cartel because it owned less than half of the crude oil production needed to meet its daily requirements; in 1952, Cities' deficit was 100,000 barrels per day (*id.* at 101a, 132a). As early as 1948, Cities' top officials, W. Alton Jones and Burl S. Watson, had talked with Colonel Drake, chairman of Gulf's board, about buying part of Gulf's 50% interest in Kuwait (*id.* at 132a). They tried again in 1951, but without avail because Gulf could not sell without A.I.O.C.'s permission (F.T.C. REPORT 131), which, ac-

cording to Drake, was "just out of the question." (R. 10781.)

On June 11, 1952, Bentley and Carter met for the first time with two Cities officers, W. W. Lowe, vice-president in charge of supply and distribution, and A. P. Frame, vice-president in charge of refining (Tr. Vol. I, 101a, 133a). Early in these discussions, Cities expressed an interest in taking over the management of the Iranian oil installations (Tr. Vol. I, 101a). To this end, Cities desired an invitation from Premier Mossadegh to Jones, Cities' chief executive officer, to inspect the Iranian oil facilities with a view to their reactivation (*id.* at 102a). Lowe explained that Cities wanted a management contract under which Cities would receive its compensation in oil. Lowe agreed that if the deal went through, plaintiff was to receive as compensation from Cities between one and two cents per barrel on all of the oil or products taken out of Iran, and plaintiff's contract would be merged into the Cities transaction (Tr. Vol. I, 101-02a; R. 11983).

Armed with a draft of the invitation prepared by Cities (R. 6181, 6197, 11982), plaintiff again flew to Tehran, met with Premier Mossadegh and obtained the desired invitation in substantially the form drafted by Cities (Tr. Vol. I, 102a). Returning to New York, plaintiff acted out a previously arranged charade with Cities, designed to give the appearance that the invitation was unsolicited, and delivered the invitation to Cities' offices amid expressions of "surprise" from Cities officials (R. 6203-04). The invitation was delivered on July 31, 1952, and Cities began immediate preparations for the inspection trip (R. 6203; 10550-62).

In this connection, Burl S. Watson, senior vice-president, prepared a memorandum for Jones, dated August 8, 1952, and labelled "secret," setting forth an outline for the formation of a management company, controlled by Cities, whose members would be "American oil companies only, which have no present interest in the Middle East," thus excluding the cartel companies (Tr. Vol. I, 139a; R. 10565-71). The management company was to reopen the Iranian oil industry and receive a long-term option to purchase crude oil at discount prices as well as a first refusal on any future concessions (Tr. Vol. I, 139-40a; R. 10577-78). Jones and Watson were both of the view that Cities had an excellent opportunity to obtain a concession from Iran and thus eliminate the daily crude oil deficiency which had plagued the company for years. Watson testified:

> "If we could get a concession well located geologically, it would be the best hunting ground we thought in the world for giving us a long-range crude supply, particularly if we could get it on the basis of the last concessions they had granted, which is a 50-50 basis. We could have reason to expect to put oil on board a tanker at costs somewhere approaching the most efficient oil field in the world, the Bergan Field in Kuwait. We didn't know anywhere else in the world that the prospects looked that bright to us.
>
> "At least I had that feeling. Mr. Jones, I believe, shared my views. We thought it was one way in which we could do a service over there and get the first refusal on some of the area that wasn't covered by the Anglo-Iranian concession, it might be very valuable to the company." (R. 10578.)

Throughout the preparation for the trip to Iran and during the first part of the trip, elaborate precautions were

taken to preserve the utmost secrecy (Tr. Vol. I, 135a). Watson, who remained in New York, instructed the members of Jones' party to avoid all outside communication, even with their own wives (*ibid.*). A secret cable code was prepared and used by Jones and Watson in communicating with one another during the trip (*ibid.*). Identity of the members of the Cities group was withheld from the press, and, when news of the trip leaked out, Watson issued a misleading statement to the press in New York and refused to answer a series of pointed questions put to him by the *Oil and Gas Journal* (Tr. Vol. I, 136a; R. 10754-62). The need for secrecy was brought home by advertisements run in the press by A.I.O.C. inviting other oil companies to join in its boycott of Iranian oil and threatening action against them if they refused. One of A.I.O.C.'s advertisements, which appeared in *The New York Times* on August 6, 1952, after alleging that Iran was violating "the basic principle of sanctity of contracts," went on to say:

> "In these circumstances the Company remains confident no oil company of repute nor any tanker owners nor businessmen of standing will countenance any direct or indirect participation in the unlawful actions of the Iranian Government.
>
> "Should, however, any concerns or individuals participate directly or indirectly in transactions affecting the crude oil and refined products concerned, this Company will take all such action as may be necessary to protect its rights in any country." N. Y. Times, Aug. 6, 1952, at 30, cols. 5-8.

At the same time that this warning was being published generally to the world, plaintiff and his associates were favored by a special warning in the form of a registered

letter from A.I.O.C.'s attorneys (Tr. Vol. I, 119a). This letter, marked at plaintiff's deposition as SO(NJ) Ex. W-659 for identification (R. 3488), states:

> "We have been instructed by our client, the Anglo-Iranian Oil Company, Limited, of Britannic House, Finsbury Circus, London, England, to give notice to you as follows:
>
> "It has been brought to our client's notice that you are proposing to arrange for the purchase, acquisition or disposal of crude oil or oil products derived from Southern Persia to which our client has exclusive rights by virtue of its Convention of April 29, 1933 with the Government of Persia. We draw your attention to the fact that any purchase, acquisition or disposal (or any action in aid of such purchase, acquisition or disposal) of such crude oil or oil products would be contrary to international law and a violation of our client's legal rights, and inform you that our client will take all such action as may be considered necessary in order to protect its rights, including its rights in regard to such crude oil or oil products."

Before leaving for Iran, Jones called on President Truman and Secretary of the Interior Oscar Chapman to seek their blessing for the trip (R. 10605). Watson, who accompanied Jones to Washington, was left sitting in Cities' Washington office while Jones conferred privately with these officials (R. 10604).

On August 16, 1952, plaintiff flew to Tehran to make arrangements for living accommodations for the Cities party, consisting of Jones, J. E. Heston (crude production), A. P. Frame (refining), R. V. Whetsel (foreign operations), and J. M. Robeson (Jones' executive secretary) (Tr. Vol. I, 103a).

On the way to Iran, Jones stopped at The Hague, where he conferred for five days with Jan Sandberg (R. 10336, 10348). Sandberg, a partner in the leading private banking firm of Pierson, Heldring & Pierson, represented a large group of Cities stockholders (R. 10534) and, according to Watson, was connected with Royal Dutch/Shell (R. 10693), a major international oil company, a member of the cartel and a co-conspirator named in the complaint (Tr. Vol. I, 75a). In the court below, Cities contradicted Watson's testimony by submitting an affidavit from Sandberg stating that he had no official connection with Royal Dutch/Shell (Tr. Vol. II, 459a). Whatever Sandberg's connection with Royal Dutch/Shell was, Watson was satisfied that a connection existed, and he has never retracted his testimony.

No member of the Jones party participated in these conferences between Jones and Sandberg. Indeed, vice-president Frame, who stopped in Holland with Jones, spent the five days doing "some sightseeing and a lot of waiting." (R. 10348.) Jones did not disclose his discussions at The Hague to Frame (R. 10348), nor did he confide in Watson after the trip (R. 10730-31). Characteristically, Jones carried on his activities with very little help from others (R. 10730-31).

During his stay at The Hague, Jones also telephoned Watson to find out how many tankers would be available to Cities to move Iranian oil to the United States (Tr. Vol. I, 141a; R. 10626). Watson cabled a coded response, saying that Cities could transport 200,000 barrels a day by the end of 1954 (Tr. Vol. I, 141a).

Arriving on August 25, 1952, in Iran, where they were warmly welcomed (Tr. Vol. I, 130a, 138a), Jones and his party remained for approximately three weeks. Frame

inspected the refinery at Abadan and found that it was in good shape and had been well maintained since the departure of the British (R. 10362). Heston inspected the oil fields and found them in good condition and capable of producing a million barrels a day (R. 10974). Whetsel inspected the docks and loading facilities at Abadan, which he found ready for shoal-draft vessels, and the port of Bandar Mashur, which he found ready to receive deep-draft vessels (Tr. Vol. I, 138a; R. 10363). Jones orally reported these findings to Premier Mossadegh (R. 10365-66) and promised to send him a written report later (R. 10726-27, 10935).

As mentioned earlier, Jones had spoken in the past to Colonel Drake, chairman of Gulf's board, in an effort to obtain for Cities a portion of Gulf's interest in Kuwait (R. 10780). By 1952, the talks had turned to a possible purchase by Cities of Kuwait oil from Gulf (R. 10780-81). Gulf and A.I.O.C., two of the members of the cartel, jointly held the entire Kuwait oil concesssion through their ownership of Kuwait Oil Company. F.T.C. Report 131. During his stay in Iran, Jones made a secret trip to Kuwait to visit the oil company there (R. 10734-38). The trip was arranged by Watson after Jones had left for Iran (R. 10377, 10734). So far as is known, none of Jones' assistants accompanied him, nor were plaintiff and his associates, who were in Iran, informed of the trip (R. 2495, 10371, 10445). In fact, the trip was so secret that Cities kept its own attorney in the dark about it, with the result that he stood up in the district court below during argument of the motion for summary judgment in 1960 and flatly stated: "It is true that Mr. Jones was invited to go to Kuwait, but he never got there." (Tr. Vol. III, 121.) The truth

was not revealed until Frame was examined by plaintiff in 1964, after Jones had died (R. 10371).

On the return trip to the United States, while the group was in Paris, Carter requested Jones' assistance in persuading Secretary of the Interior Chapman, who headed the Petroleum Administration for Defense, to support a sale of Iranian aviation gasoline to the United States Air Force under plaintiff's contract (Tr. Vol. I, 105-08a, 147a). Both Whetsel of Cities and an officer of the State Department told plaintiff that, in their opinion, such a sale might well break the blockade of Iranian oil (Tr. Vol. I, 107a; R. 2479-80, 6323). Carter believed that Jones could persuade Secretary Chapman to support the proposed sale. According to a memorandum, dated September 24, 1952, produced by defendants from Carter's file during the deposition of plaintiff (SO(NJ) Ex. C-375 for ident.; R. 2455, 11984), a cable was sent by Carter from Paris on September 21, 1952, to Secretary Chapman, saying that a cargo of aviation gasoline to be lifted by a United States government tanker at the Abadan refinery had been offered to the United States Air Force, subject to clearance by the State Department, and asking for Chapman's support. The memo goes on:

> "Mr. Jones read the cable before we sent it and ok'd its transmission. It was also suggested that Mr. Jones send a cable to Mr. Chapman urging his consideration of furthering the matter with the State Department but Mr. Jones felt that it was better to telephone Mr. Watson and in turn have him call Mr. Chapman concerning this tanker." (Tr. Vol. I, 147a; R. 11984.)

Jones, however, cabled Watson to kill the deal. His message read as follows:

> "WATSON. AS YOU KNOW CARTER IS TRYING DESPERATELY TO HOLD ON TO HIS CONTRACT AND HOPES SOMETHING WILL HAPPEN TO MAKE IT POSSIBLE FOR HIM TO PERFORM THEREUNDER. THIS SEEMS LIKE A REMOTE POSSIBILITY AND I HAVE SO TOLD HIM. AMONG OTHER THINGS HE HAS OPTION AND HAS OFFERED US MILITARY CARGO OF AVIATION GASOLINE FROM ABADAN AND THROUGH SOME OF HIS REPRESENTATIVES IS TRYING TO EXERT PRESSURE THROUGH CHAPMAN OR SENATOR JOHNSON TO GET ACCEPTANCE. WHILE NOT WANTING TO BE PUT IN POSITION OF INTERFERING WITH HIS BUSINESS I TOLD HIM FRANKLY I DOUBTED WISDOM OF THIS ACTION AND DID NOT FEEL UNDER THE CIRCUMSTANCES THERE WAS ANY CHANCE MILITARY WOULD PURCHASE PRODUCTS. HE ASSURED ME IN TEHRAN HE WOULD DROP THE MATTER BUT ON MY ARRIVAL HERE HE TOLD ME HE WAS STILL PURSUING IT AND HAD DRAFTED TELEGRAM TO CHAPMAN USING MY NAME. I ASKED HIM TO DELETE ANY REFERENCE TO ME AND TOLD HIM I WOULD COMMUNICATE WITH YOU. UNDERSTAND WALDRON FLYING TO NEW YORK TONIGHT AND MAY CONTACT YOU THERE TOMORROW. WOULD LIKE YOU TO REACH CHAPMAN AND TELL HIM I SERIOUSLY QUESTION WISDOM OF SUCH ACTION AND DO NOT WANT TO BE CONNECTED WITH IT IN ANY WAY. JONES" (Tr. Vol. I, 148a; R. 10680-81.)

Watson replied by cable the next day that he had delivered Jones' message not only to Secretary Chapman but also to John E. Warren, who was then Deputy Administrator of the Petroleum Administration for Defense, and subsequently, president of Cities (Tr. Vol. I, 148a; R. 10417). The aviation gasoline transaction died (Tr. Vol. I, 149a).

Jones, meanwhile, again stopped off in Holland with Frame to meet with Sandberg on his way to New York (R.

10412-13). Although the meeting was held right at the Amsterdam airport, Frame was once again left out of the conversations (R. 10413).

Returning to New York, Jones' assistants continued to work on the written report which Jones had promised Mossadegh (Tr. Vol. I, 141a). The report went through several drafts, the last to be produced to plaintiff bearing the date of October 31, 1952 (Tr. Vol. II, 1-37a). The October 31 draft reflects the view of both Jones and Whetsel, Cities' expert on foreign operations, that the Iranian oil facilities could be reactivated either with or without British co-operation. Jones had already said at a press conference in Tehran that he did not regard British co-operation as being necessary to reactivate Iran's oil industry and that he was considering how Cities might help to get the Iranian oil industry going again (R. 10382, 10405). N. Y. Times, Sept. 19, 1952, at 8, col. 3. Whetsel, based on his experience with Cities' involvement in Mexico following that country's nationalization of its oil industry, believed that Iran could and should follow Mexico's lead "and start the long slow process of building up new markets." (R. 10427-32.)

The October 31, 1952, version of the report concluded that two solutions to the Iranian oil problem were possible. The first, contemplating quick reactivation of the industry, required British co-operation, and, to this end, Cities proposed an arbitration panel comprised of British and Iranian representatives with "an experienced U. S. oilman" as chairman (Tr. Vol. II, 36-37a). Cities' alternative suggestion, to be put into effect if British co-operation was not forthcoming, called for the National Iranian Oil Company to enter into a long-term agreement with "an American oil company" to purchase Iranian crude and develop the in-

dustry over a longer period of time (Tr. Vol. II, 37a). Thus, the report shows that Cities desired an important role in the solution to the Iranian controversy. Under either solution, Jones, "an experienced oil man," and Cities, the pre-eminent non-cartel "American oil company" known to the Iranians, would play leading roles.

When Jones returned home, he found growing hostility in the industry (R. 10347, 10508). On their part, the British were near apoplexy over his trip, alternately discounting Cities' ability to take over Iranian oil and threatening litigation if it did. N.Y. Times, Aug. 26, 1952, at 1, cols. 2-3; Journal of Commerce, Aug. 27, 1952, at 11, cols. 1-3; Wall Street Journal, Sept. 12, 1952, at 4, cols. 1-2; BUSINESS WEEK, Sept. 27, 1952, at 29.

Though Watson had put plaintiff off by telling him that Cities planned to sit and wait (R. 6322), Whetsel revealed to him Cities' continuing interest in Iranian oil by saying that the situation might open up (R. 6323). At his deposition Watson admitted, contrary to what he had told Waldron in September 1952, that Cities was still interested in getting a concession or a long-term purchase contract in Iran (Tr. Vol. I, 153a; R. 10777-78).

Earlier in the year, the American Petroleum Institute had voted to award Jones an honorary medal, but now they changed their minds, and Jones was not awarded the medal (R. 5034). Whetsel confided to Waldron that at the Institute's convention in November 1952 representatives of the major companies buttonholed Jones and threatened him with a boycott unless Cities stayed out of Iran (Tr. Vol. I, 153a). As Whetsel put it:

> "The Big Boys said that they wished Jones well on his Iranian oil venture and hoped he got a lot of oil

and hoped he got it right away because he wasn't going to get any more from them." (R. 5034.)

Whetsel added in his conversation with plaintiff, "You know, that could be disastrous." (R. 6338.)

Jones promptly got busy repairing his damaged reputation with the majors. The report being prepared for Premier Mossadegh, containing the view that Cities could help Iran through a long-term purchase contract, was apparently never sent (R. 10372, 10727-28). Jones, who had falsely told Secretary Chapman that the invitation from Mossadegh had come unsolicited (Tr. Vol. I, 136a), now obtained a fantastic letter from Chapman, purporting to "recount the history" of Jones' trip to Iran and representing that Jones had reluctantly accepted the invitation at the urging of government officials "in the interests of world peace." (Tr. Vol. II, 392-93a.) Jones' public transition from intermeddler to "honest broker" became complete on January 6, 1953, when he wrote to incoming Secretary of State Dulles and Attorney General Brownell that "the only honorable solution" is an "agreement with Anglo-Iranian, Shell and American companies" (Tr. Vol. II, 394-95a, 397-98a)—just the opposite view from that taken by Jones and Watson in August, from that taken by Cities' foreign operations expert, Whetsel, and from that taken in the alternative recommendation of the now-forgotten draft report to Mossadegh.

Three weeks later, on January 26, 1953, Cities signed a 15-year contract with Gulf to purchase 21,000 barrels per day of Kuwait oil with an option to purchase an additional 30,000 barrels per day (Tr. Vol. II, 252a, 253a, 269a). Though changes in the terms of the contract favor-

able to Cities had been made in the preceding months, it was necessary at the last minute for Jones to communicate directly with Colonel Drake to obtain a most-favored-nations clause, covering future price adjustments, to protect Cities (R. 10804-07).

In summary, when Jones went to Iran, Cities had before it the opportunity to participate in or manage the oil industry of one of the top oil producing countries in the world. It had an immediate need for 100,000 barrels of oil a day in its own markets, and it foresaw the possibility of building up additional marketing strength over the years. Transportation to bring up to 200,000 barrels of oil per day to the United States was available from Cities' own fleet in about two years, and plaintiff had secured an offer to supply a large number of additional tankers over the same period (Tr. Vol. II, 103-04a, 141a; R. 3032-33). Cities' inspection trip revealed that the Iranian oil facilities were in good order and presented no obstacle to reactivation of the industry. The opportunity and need to act were clearly there; the Iranians were enthusiastic; but Cities declined to proceed.

Plaintiff meanwhile had continued his efforts to sell Iranian oil under his contract. He contacted many companies (Tr. Vol. I, 104-15a), including several on the West Coast of the United States (*id.* at 108-13a), where there was a crude oil shortage of 100,000 to 200,000 barrels of crude oil per day (*id.* at 108a). One such company, Richfield Oil Corporation, faced a daily shortage of 20,000 barrels (*id.* at 112a). Richfield was a large integrated company jointly controlled by Cities and Sinclair, each of which held one third of the equity in the company (*ibid.*).

The negotiations proceeded to the point that plaintiff, at Richfield's request, had a five-gallon sample of Iranian crude oil shipped to Richfield's laboratory for analysis, when plaintiff was suddenly informed by telephone that Richfield had decided it had no need for Iranian oil (*id.* at 112-13a). No explanation for the decision was offered, although the Richfield official admitted that the oil met their specifications and that the West Coast shortage still existed (*id.* at 113a).

In June 1953, while the Richfield negotiations were pending, plaintiff's contract with National Iranian Oil Company expired (R. 399-400). Despite plaintiff's efforts and the known need of many American marketers, plaintiff had been unable to sell one drop of oil under the contract.

The Iranian Oil Consortium was formed in 1954 to run the Iranian oil industry (Tr. Vol. II, 281a). The Consortium was comprised of the cartel members, each of which took a percentage that roughly maintained the 60%-40% participation by British and American companies, respectively, which had existed in the Middle East since 1928. *Hearings on Current Antitrust Problems Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 1st Sess., ser. 3, pt. II, at 764 (1955). When it was feared that the monopolistic nature of the Consortium appeared too obvious, the members gave up five percent of their interest to be divided among deserving American independents (Tr. Vol. II, 40a, 288a). Cities was awarded such a share and turned it over to Richfield (*id.* at 369a).

Proceedings Below

The complaint was filed on June 11, 1956. In the complaint, plaintiff alleged that following nationalization in Iran the defendants other than Cities, pursuant to a plan to monopolize Middle Eastern petroleum and petroleum products, conspired among themselves to boycott Iranian oil and to prevent plaintiff from exploiting his contract (Tr. Vol. II, 55-56a). Plaintiff further alleged that Cities joined the other defendants in the conspiracy and that Cities, "in furtherance of defendants' scheme broke off further negotiations with plaintiff and the National Iranian Oil Company and refused to enter into any contract or arrangement with reference to Iranian petroleum." (*Id.* at 60-61a.) Plaintiff also alleged that, in return, Cities received a huge quantity of Kuwait oil far below the posted price and the opportunity to participate in the Consortium which eventually took over the Iranian oil industry (*ibid.*).

Defendants' immediate response to the complaint was to secure an order extending their time to answer until after they had an opportunity to examine plaintiff. In addition, plaintiff was stayed from all discovery until his examination was completed and defendants answered the complaint (R. 11045-48).

Plaintiff's deposition commenced on September 10, 1956. After he had been examined for 62 days (comprising more than 4200 printed pages of testimony) and after 825 exhibits had been marked for identification, plaintiff on December 30, 1957, moved, pursuant to rule 30(d), Fed. R. Civ. P., to terminate the deposition upon the ground that continuance of the deposition was in bad faith and designed to annoy, embarrass and oppress plaintiff, since defend-

ants could no longer claim that they could not adequately frame their answers to the complaint or formulate motions to dismiss (R. 11051-56) or that they did not know plaintiff or the basis for his claim (Tr. Vol. II, 78a). Plaintiff urged that the time had come when the complaint should be answered and he should be permitted to have his own discovery like any other litigant. The motion was heard by Judge William B. Herlands,* who denied it from the bench and, on his own motion, granted defendants 52 additional days to conclude their deposition of plaintiff and added 174½ days more to examine his associates (R. 11159-63). Moreover, the stay of all discovery by plaintiff was enlarged so as to prevent plaintiff from undertaking any discovery until after defendants had examined each of plaintiff's associates, who were not even parties to the action (R. 11162). None of the defendants had moved or cross-moved for or otherwise requested such relief. The order, signed February 11, 1958, and still in effect today, has since been cited by Professor Moore as the classic example of the means by which powerful defendants can abuse the discovery process and "stymie the action for an inordinate length of time." 4 MOORE, FEDERAL PRACTICE ¶26.13[2], at 1151-52 (2d ed. 1966).

Cities' motion for summary judgment was made on April 8, 1960, shortly after completion of Cities' examination of plaintiff. The examinations of plaintiff's associates had not then been completed, so plaintiff was forced to face the motion without having received an answer from any defendant and while stayed from asking a single question.

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* Later, on May 1, 1959, Judge Herlands was assigned to the case for all purposes (R. 11182).

The motion was supported by the affidavits of one George H. Hill, Jr., a lawyer for Cities (R. 9848) who, in 1963, became its general counsel. 1966-67 WHO'S WHO IN AMERICA 963 (1966). Hill had never met plaintiff (R. 9865) and knew nothing about plaintiff's dealings with Jones or Cities' Iranian venture (R. 9902). Hill's moving affidavits and supporting documents failed to deny participation by Cities in the conspiracy to boycott Iranian oil and artfully sought to establish only that the Kuwait contract with Gulf and Cities' opportunity to participate in the Iranian Oil Consortium were not payoffs for any conspiracy (Tr. Vol. II, 146-370a, 371-411a). Although it was Jones who received the invitation to go to Iran, who talked privately with United States Government officials before leaving for Iran, who talked privately with Sandberg on the way to and from Iran and who talked privately with Premier Mossadegh while in Iran, who went alone on a secret trip to Kuwait, who kept decisions on Cities' involvement in Iran to himself after returning from Tehran, and who was threatened at the A.P.I. convention, Cities chose not to submit Jones' affidavit. Plaintiff's allegations of conspiracy were not denied and remain undenied to this day.

Upon the argument of the motion on May 9, 1960, plaintiff's counsel first pointed out to the court that plaintiff had been barred completely from normal discovery (Tr. Vol. III, 66-67), that the proof of plaintiff's case was in the possession of the defendants, not just Cities but the other defendants as well (*id.* at 118), and that, consequently, the motion should "be denied outright as impossibly premature." (*Id.* at 81.) As an alternative, counsel suggested that plaintiff be relieved from the crippling stay of discovery so as to have an opportunity to obtain facts

with which to oppose the motion (*ibid.*). While asking for discovery of all defendants, since proof of Cities' membership in the conspiracy might rest in the files of any one of them, counsel urged that the place to begin was with Jones (*id.* at 118). Whetsel, who actively sought Cities' participation in Iran and who told plaintiff of the threat to Cities at the American Petroleum Institute convention, had already been lost to plaintiff by death on January 12, 1960.

The court reserved decision on Cities' motion and held it under consideration for nearly a year. On March 30, 1961, the court entered an opinion (Tr. Vol. I, 70-72a) containing several observations "[f]or the guidance of counsel" which, in unmistakable terms, revealed that the court had already concluded, before plaintiff was given a chance at discovery, that plaintiff's entire case was without merit. Before plaintiff was allowed to ask a single question of Cities (or anyone else), the court observed that, "It is doubtful in the extreme whether plaintiff has shown that there is a genuine issue as to any material fact." (*Id.* at 71a.) Observing that "*even this* private antitrust case" had indirect law enforcement aspects, the court nonetheless "judged" plaintiff's claim to be "so insubstantial" that plaintiff was not to be allowed the usual pre-trial proceedings (*id.* at 71-72a; emphasis added).

In their full text, the court's "observations" are as follows:

> "1. It is doubtful in the extreme whether plaintiff has shown that there is a genuine issue as to any material fact with respect to his claim against the defendant Cities Service Co.
>
> "2. The naming of Cities Service Co. as a defendant herein when the complaint was drawn was based

only on suspicion and on a gossamer interference drawn from the mere sequence of events.

"3. But for the prevailing strict policy in this circuit with respect to the invocation of the summary judgment procedure, the court would have granted the motion. This court has examined virtually every reported summary judgment decision rendered in this circuit since *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946), over one thousand in number. The rationale and philosophy of *Arnstein* v. *Porter* have not been attenuated by the subsequent course of decisions.

"4. In view of (a) the surface complexity of the case, (b) the indirect law enforcement aspects of even this private antitrust case (c) the very extensive pretrial examinations of the plaintiff already conducted by the defendants and the complete absence of any pretrial examination of any defendant by the plaintiff—it would appear to be fair to postpone a decision of the summary judgment motion and to afford the plaintiff an opportunity to engage in appropriately supervised discovery and related pre-trial proceedings.

"5. Because plaintiff's claim against the defendant Cities Service Co. is, judged by the entire available record, so insubstantial, the plaintiff will not be given carte blanche authority to conduct untrammeled pretrial proceedings. Such proceedings will be closely regulated. The usual Federal rule permitting fishing expeditions will be curtailed. A just and workable balance will be maintained between the respective interests of the opposing parties." (Tr. Vol. I, 71-72a.)

At the time plaintiff's case was "judged" to be "insubstantial," the court had before it only a controlled record, selected by Cities, consisting principally of affidavits and documents from Hill, a lawyer, who had not gone to Iran

with Jones (R. 9880), who had not met plaintiff (R. 9865) and who answered plaintiff's allegation of conspiracy only by addressing himself to the alleged rewards for the plot (Tr. Vol. II, 150a).

At the hearing on the proposed order to implement the court's opinion, plaintiff again urged that he was entitled to examine Jones first of all (Tr. Vol. III, 136). However, Cities, responding to the obvious invitation from the court to submit a restrictive order, contended that only Hill, whose affidavits had been submitted by Cities in support of the motion, should be examined and that only two subjects, the Kuwait contract with Gulf and Cities' opportunity to participate in the Consortium, should be explored (*id.* at 133-34). Cities based its contention upon the pretense that plaintiff's case would necessarily stand or fall with his ability to prove two items of evidence pleaded in the complaint, Kuwait and Consortium. In accepting this argument, the court focused on *why* Cities conspired and ignored the basic issue—conceded to be "the true question" by Cities' counsel on the original argument of the motion and formulated by him to be—"Did Cities conspire with others to boycott the plaintiff?" (Tr. Vol. III, 60.)

Announcing the approach it had decided to use to curtail, limit and restrict plaintiff in the conduct of his case, the court said:

> "'Now, this is going to be a circumscribed and restricted examination, and I am not going to let the plaintiff examine as many people as he wants, nor am I going to permit the plaintiff to conduct the kind of examination that ordinarily is permitted under Rule 26 and the related rules.'"

* * *

"I shall approach—I tell you now, Mr. Beshar [plaintiff's counsel], I am approaching this matter with pragmatic caution. I will deal with this in accordance with the dynamics of the situation. Instead of entertaining applications to narrow the examination, which is the ordinary situation, I am looking through the telescope at the other end: I am starting out with the narrow examination and then, as occasion may warrant and considered on the merits in the light of the situation, I will determine whether and to what extent there should be enlargement of the boundaries of examination because I believe, having read the thousands of pages of testimony and exhibits and the briefs in this matter, that the plaintiff at this point has not presented a sufficient basis to justify the ordinary Rule 26 type of examination." (*Id.* at 137, 139-40.)

The restrictive order proposed by Cities permitting only Hill's deposition was signed at the conclusion of the hearing on May 3, 1961 (Tr. Vol. III, 143), and filed the next day (Tr. Vol. I, 68-70a). However, plaintiff was made to wait yet another year before commencing his discovery, because the court had directed that the scheduled depositions of the nonparty witnesses, whose testimony was merely cumulative of the 6,459 pages of plaintiff's testimony already taken, must be completed prior to the commencement of Hill's deposition (Tr. Vol. I, 69a; Vol. III, 127). During this delay, Jones, who knew all there was to know about Cities' Iranian venture, was killed in an airplane crash on March 1, 1962. N. Y. Times, Mar. 2, 1962, p. 15.

Hill's deposition could hardly have been more stultifying. The examination proved nothing because Hill knew nothing. He had not been a participant in the Iranian venture, had not been privy to Jones' thoughts or plans and

had not been informed of Jones' activities. The extent of Hill's knowledge concerning Jones' trip to Iran, he testified, was that he was "aware" that Jones was there (R. 9880). As Hill admitted:

> "Q. As far as Iran was concerned he kept pretty much to himself; is that correct? A. That's correct, in so far as I was concerned." (R. 10035.)

Hill also admitted that in preparing his affidavit in support of Cities' motion he never discussed the facts with Jones, nor did he review Jones' files (R. 9871, 9981). He did not talk to Frame nor review Frame's files (R. 9854, 9981). He did not talk to Watson, nor Lowe, nor did he review their files (R. 9853, 9854, 9871, 9982). The result was predictable: Hill, who knew nothing of plaintiff or Cities' Iranian venture and did nothing to inform himself, could safely testify that he knew of no connection between Iran and Cities' contract with Gulf for Kuwait oil or Cities' opportunity to participate in the Consortium. His testimony was that of a nonparticipant.

The court's order directing the examination of Hill made no provision for the production of documents, even on the limited subjects into which plaintiff was permitted to inquire (R. 9845). Perhaps out of embarrassment, Cities' counsel volunteered some documents (R. 9839), but the selection of documents for production remained in Cities' discretion, and, needless to say, documents pertaining to Cities' dealings in Iran and with plaintiff were not produced.

Following the completion of Hill's deposition, plaintiff, in May 1963, moved for further discovery, asking specifically for the written statements which had been prepared in 1956 by Jones' colleagues, for their underlying

files and for the depositions of the few surviving Cities officers who had dealt with plaintiff (R. 11762-72). It had been revealed during Hill's deposition that, shortly after commencement of the action, Watson, recognizing the important issues in the case, called upon a number of Cities executives (1) to prepare a detailed memorandum of all conversations and other dealings with plaintiff and the members of his group and (2) to produce all files relating to Jones' trip to Iran in 1952 (R. 10008-11, 11988). Since the documents had already been gathered together, production could cause no conceivable hardship.

At the oral argument, on May 27, 1963, plaintiff again requested discovery of the other defendants as well as discovery of Cities (R. 11799). Cities, of course, urged that summary judgment should now be entered in its favor. Despite the fact that Hill's demonstrated lack of knowledge had prevented plaintiff from learning anything about Cities' involvement in the alleged conspiracy to boycott Iranian oil, the court, still "looking through the telescope at the other end" (Tr. Vol. III, 139), required that plaintiff set forth "a complete, detailed inventory listing whatever facts or circumstances there are that the plaintiff is relying upon to support his pending request for further discovery * * *" (R. 11811), and even asked plaintiff's counsel to specify the very date on which Cities joined the conspiracy:

> "The Court: What is the date, the first date that you claim evidenced the plan or intention or conduct on the part of Cities Service to boycott the plaintiff?
>
> "Mr. Beshar: Most respectfully, your Honor, I'm going to decline to go down that route with you. This underlines the entire, in my mind, [error] of the plai

here. You expect me in advance of any meaningful discovery to start giving you dates at which [a] conspiracy commenced." (R. 11823.)

Because the court again focused on the alleged "payoffs" for Cities to join the conspiracy rather than on whether Cities had in fact conspired (R. 11794), plaintiff, on July 12, 1963, amended his complaint to allege simply that, at a date unknown to plaintiff, Cities joined the conspiracy to boycott Iranian oil (Tr. Vol. I, 78a, 80a). The allegations concerning the contract with Gulf to buy Kuwait oil and the opportunity for Cities to participate in the Iranian Oil Consortium, which were two items of evidence, were removed from the complaint, though not, of course, from plaintiff's case.

Again, the court held the motion under advisement for about a year until, on June 23, 1964, it granted plaintiff further but still narrowly limited discovery of Cities (Tr. Vol. I, 21a, 54-58a).*

The resultant order (*id.* at 17-20a), dated July 9, 1964, finally gave plaintiff the chance to examine some of the Cities officers who had some knowledge of Cities' dealings in Iran, but the order was so restricted in time, subject matter and scope so as to make the discovery privilege substantially less than that to which a federal litigant is entitled.

In time, the order was limited to the period from the date when plaintiff's associates first met with Cities to a date just after the Jones entourage returned from Iran, even though much of Cities' Iranian activity occurred out-

* In the June 23, 1964, opinion, the court, in addition, denied a motion for summary judgment by the remaining defendants. The opinion is reported at 231 F. Supp. 74.

side this period (Tr. Vol. I, 152-55a). In subject matter, the order was limited to specified items encompassing some of the relevant issues but preventing the development of others (*id.* at 155-57a). In scope, the order was limited to "conversations and communications," not facts (*id.* at 151-52a).

The provisions of the order restricting plaintiff's discovery were as follows:

> "(a) The two issues defined in the Court's order filed May 4, 1961;
>
> "(b) Conversations and communications, written or oral, from on or about June 11, 1952, to, on or about, October 1, 1952, between defendant Cities Service Company and any other defendant pertaining to:
>
> "(1) Waldron, Brown, Nelson, Bentley, Zoes, or Carter;
>
> "(2) The refining, marketing, distributing, producing or managing of Iranian oil;
>
> "(3) Plaintiff's proposed deal, contract, agreement or other arrangement with the Iranian Government;
>
> "(4) The subject of defendant Cities Service Company's giving up, terminating, dropping or discontinuing negotiations with the Iranian Government in regard to any of the matters mentioned in item (2) *supra*;
>
> "(c) Conversations and communications, written or oral, from on or about June 11, 1952, to, on or about, November 1, 1952, between deponent and any other Cities Service Company official or employee pertaining to the subjects mentioned in items (1) through (4) of subparagraph (b) *supra;*

"(d) Conversations and communications, written or oral, from on or about June 11, 1953, to, on or about, September 30, 1953, between defendant Cities Service Company and any other defendant pertaining to the subject of negotiations between plaintiff and Richfield Oil Corporation concerning the purchase of Iranian oil;

"(e) Conversations and communications, written or oral, from on or about June 11, 1953, to, on or about, September 30, 1953, between deponent and any other official or employee of defendant Cities Service Company pertaining to the subject set out in subparagraph (d) *supra.*" (Tr. Vol. I, 18-19a.)

The witnesses designated by the court were Burl S. Watson, Cities' chairman of the board, who had been executive vice-president and second in command to Jones in 1952; Alfred P. Frame, vice-president and refinery expert, who had inspected the Abadan refinery in 1952; and J. Edgar Heston, who was the expert on oil production matters on the 1952 trip.* Cities was directed to produce documents "which relate to the subjects upon which defendant Cities Service Company is to be examined * * *." (Tr. Vol. I, 19-20a.)

The depositions of Watson, Frame and Heston, which followed in the summer of 1964, threw a great deal more light on Cities' 1952 Iranian project. Many of the facts set forth earlier, pp. 10-20, were discovered by plaintiff in the course of these depositions. For example, it was revealed, for the first time, that Cities had concluded that

* Four Cities executives with whom plaintiff dealt had already died, Jones, Whetsel, Lowe and George Shaw, the Cities' official with whom plaintiff performed the charade of the "surprise" delivery of the Mossadegh invitation to Jones.

it could develop markets for Iranian oil over a period of time; that Jones visited Jan Sandberg, an ideal go-between to approach the cartel; that Jones had gone to Kuwait to visit installations maintained by two of the alleged conspirators (a trip previously denied by Cities' counsel); that Jones had secretly undermined plaintiff's efforts to break the blockade by means of a shipment of aviation gasoline; and that Cities had established, shortly after Jones returned from Iran, an "Iranian room," staffed by an Iranian, to maintain separately its documents relating to Iran (Tr. Vol. I, 152a).

The time limitations of the order foreclosed plaintiff in his effort to conduct complete discovery (Tr. Vol. I, 152-55a). Included in Cities' moving papers were sixteen documents bearing dates later than November 1, 1952 (exhibits 66-81 to Hill's supplementary affidavit, Tr. Vol. II, 384-411a), concerning subjects other than the contract with Gulf for Kuwait oil and the Consortium, and revealing at least some of Jones' communications about the Iranian oil controversy with other oil executives, Iranians and United States officials. Despite the fact that Cities relied on these documents to obtain summary judgment, plaintiff was given no opportunity to discover what documents bearing on the issues Cities omitted from its submission on the motion. Plaintiff was also refused access to the originals of the documents and prevented from any examination concerning their preparation or use. Cities' counsel stated:

> "Mr. Costikyan: * * * The mere fact that something was submitted in behalf of the motion for summary judgment doesn't make it germane on this examination.

"Mr. Beshar: I just want to have the record clear that I'm being blocked from any examination with respect to any of the documents in support of your motion for summary judgment simply because of the fact that they are after November 1, 1952.

"Mr. Costikyan: Yes. I think the order that Judge Herlands signed blocks you from such an examination." (R. 10420.)

Inquiry into communications between Cities and any other defendant was arbitrarily cut off at October 1, 1952. Plaintiff was not even permitted to question the witnesses concerning the discussion within Cities of the effect of the threats of boycott made to Cities by the major oil companies at the American Petroleum Institute convention merely because the convention took place a few days after November 1, 1952, the artificial cut-off date on discussions between Cities personnel (Tr. Vol. I, 153a; R. 10423).

Similarly, the order did not permit plaintiff to see the written reports made by Cities officials at Watson's request in 1956 since, while they were made when the events were relatively fresh in the witness' minds, they were, nevertheless, outside the permissible time period (Tr. Vol. I, 155a).

Perhaps the most extreme example of the arbitrary manner in which plaintiff's questioning was cut off by the time limitations of the order occurred when plaintiff was blocked from asking about the "Iranian room" (Tr. Vol. I, 152a). Plaintiff was stopped because, although Cities hired an Iranian employee to staff the room before November 1, she apparently did not actually get the room set up until after that date (*ibid.*; R. 10970-71).

The subject matter of plaintiff's discovery was also narrowly confined. Although Watson testified that Cities' main interest was to get a concession for Iranian oil in the

ground, plaintiff was not allowed to inquire whether Cities had actually negotiated for or obtained such a concession inasmuch as the order did not list "concessions" as a subject of inquiry (Tr. Vol. I, 156a). Plaintiff had testified that during the trip to Iran, Jones expressed an interest in obtaining a concession in Baluchistan, an area in Iran not covered by A.I.O.C.'s former concession. Plaintiff was blocked from this promising lead, however, despite Watton's corroboration of plaintiff's testimony that a concession in Iran was Jones' main interest (*id.* at 156-57a).

The requirement of the order limiting the examination to conversations and communications between Cities personnel or between Cities and any other defendant had the effect of prohibiting plaintiff from examining the witness as to conversations between Jones and Premier Mossadegh, or conversations between the witness and plaintiff or members of plaintiff's group, or conversations between Jones and Sandberg. Even Jones-Mossadegh communications which were discussed with other Cities personnel were not produced by Cities on the ground that they were not, themselves, communications between Cities personnel (R. 10555). Thus, when asked to produce the invitation from Mossadegh to Jones which plaintiff had obtained, Cities' counsel said:

> "I decline to produce it. I don't think it is within the scope of the order." (R. 10311.)

The effect of this was, of course, to deprive plaintiff of access to any of Jones' documents except those interoffice memoranda Cities produced (Tr. Vol. I, 152-55a).

As to conversations between the witness and plaintiff's group, the order had this result:

"Mr. Beshar: Are you taking the position that if this witness discussed Iranian oil with, for example, someone like plaintiff, directly, and there was no other Cities Service person present, that I may not question him on that area?

"Mr. Costikyan: Of course." (R. 10485.)

When Watson admitted that Sandberg, whom Jones saw for five days on the way to Iran, was connected with Royal Dutch/Shell, Cities' counsel immediately objected to any further questioning about Sandberg, on the ground that, while Royal Dutch/Shell was named in the complaint as a co-conspirator, the order only permitted examination into communications with defendants (Tr. Vol. I, 155a; R. 10693-94).*

Plaintiff could not ask witnesses what they did or what they knew but only what they discussed with other Cities employees. This led to interruptions and objections by counsel which would be unthinkable under normal discovery procedures. For example, when counsel asked Heston what he learned on the trip to Iran, the following ensued:

"Q. Mr. Heston, what did you learn on that trip, if anything, that you did not already know when you went over?

"Mr. Costikyan: Objection, instruct him not to answer.

"Mr. Beshar: On what grounds?

* Having blocked plaintiff from asking about Sandberg, Cities felt perfectly free to approach Sandberg *ex parte* and submit his affidavit denying the connections with Royal Dutch/Shell which Watson had admitted (Tr. Vol. II, 459a). Significantly, Sandberg's affidavit was silent as to his discussions with Jones when the latter was on his way to and returning from Iran.

"Mr. Costikyan: On the ground that what he learned is not within the scope of this examination. You are not entitled to an examination as to what this man learned. You are entitled to an examination as to what he discussed with other Cities Service officials." (R. 10909-10.)

Again, when counsel asked Heston what he did in connection with revisions of the proposed report to Mossadegh, the result was as follows:

"Q. Give us your general recollection of, when you returned from Iran, what you did and were told with respect to these revisions.

"Mr. Costikyan: Can't we limit this, Mr. Beshar, to conversations with other Cities Service personnel? What he did is not within the scope of this order." (R. 10975.)

An attempt to draw out Frame's recollection by asking him what he did during the stay in Tehran was also thwarted:

"Q. Well, now, you stayed there two weeks in that house. Tell me, what did you next do with respect to Iranian oil business? A. Well, I think we met with the various officials of the National Iranian Oil Company—

"Mr. Rifkind: Tell us only about conversations." (R. 10353.)

At one point, plaintiff was caught red-handed trying to establish facts. Watson was asked whether the companies operating in Kuwait had helped to replace Iranian oil on the market following nationalization:

"Q. * * * Certainly the companies operating the Kuwait concession were playing a major role in making up the deficit; is that correct?

"Mr. Costikyan: Objection. We are getting beyond the area of the order, Mr. Beshar. Let's limit it to the scope of the order.

"Mr. Beshar: I am trying to get to the conversations that—

"Mr. Costikyan: No, you are not. You are trying to establish some facts.

"Mr. Beshar: Of course I am trying to establish some facts.

"Mr. Costikyan: And they are not facts as to conversations." (R. 10598-99.)

Following the depositions of Frame, Watson and Heston, the pattern was repeated: plaintiff moved for further discovery not only of Cities but of Carter and of the other defendants (Tr. Vol. I, 126-27a); Cities urged that summary judgment be granted without further discovery. Argument took place on February 9, 1965, and on September 8, 1965, the court granted Cities' motion and denied plaintiff's application for further discovery (*id.* at 5-17a).

The court commenced its opinion by quoting from its 1961 decision in which it relegated plaintiff to the status of a second class litigant (Tr. Vol. I, 7a). Having made plaintiff look "through the telescope at the other end" (Tr. Vol. III, 139) in the discovery subsequently afforded him and not having permitted plaintiff "the ordinary Rule 26 type of examination" (*id.* at 140), the court was able to reach the conclusion which it had forecast in 1961. Thus, having prevented plaintiff from obtaining the facts about the conspiracy, the court entered judgment against plaintiff for

having failed to set them forth. Remarkably, the court now found that "plaintiff has had ample time and opportunity to discover and present 'concrete particulars' demonstrating that there is a genuine issue for trial." (Tr. Vol. I, 16a.)

In affirming, the court of appeals said:

> "Following extensive discovery by Waldron under the Kuwait and Consortium theories, Cities Service first moved for summary judgment on April 8, 1960, but the trial court adjourned the motion and granted Waldron further limited discovery." (Tr. Vol. III, 175.)

As this passage reveals, the court of appeals was under the mistaken impression that plaintiff had already completed extensive discovery of Cities before Cities moved for summary judgment. The court of appeals' opinion also stated, incorrectly, that plaintiff had had three separate opportunities at discovery of Cities (Tr. Vol. III, 175, 2d para.). The fact is that plaintiff had no discovery of Cities before the motion was made and the discovery he was allowed thereafter was anything but extensive. Under the court's mistaken view of the facts, Judge Herlands' limitations on plaintiff's discovery may have seemed reasonable, because it may have appeared that plaintiff was attempting to obtain something more than normal discovery under rule 26. Only if the court of appeals equated extensive discovery on Kuwait and Consortium with general discovery on plaintiff's whole case does its conclusion that the district court did not abuse its discretion become understandable.

ARGUMENT

Summary of Argument

In staying plaintiff from all discovery while defendants were permitted to examine plaintiff and each of his associates one by one for scores of deposition sessions, the district court acted beyond its authority. The error was compounded when, after Cities moved for summary judgment, plaintiff's discovery in aid of his opposition to the motion was severely restricted. Plaintiffs in antitrust actions should be given wide, not narrow, discovery. Any plaintiff is entitled to liberal discovery on an issue of conspiracy for which the only source of evidence is defendants' files and testimony. In refusing such discovery, the courts below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. (Point I, *infra.*)

On its motion for summary judgment, the initial burden rested on Cities to demonstrate that there was no genuine issue of fact to be tried. Under the authorities, Cities could not even begin to sustain that burden without denying its participation in the conspiracy. This Cities never did. In relying upon the 1963 amendment to rule 56(e), Fed. R. Civ. P., to shift to plaintiff the burden of demonstrating the existence of a genuine issue of fact, the courts below went far beyond the intention of the framers of the amendment and committed error. (Point II, *infra.*)

Finally, no matter who had the burden of showing the existence of a triable issue, summary judgment should not have been granted because, even on the underdeveloped record at his disposal, plaintiff demonstrated the existence of genuine issues of material fact with regard to Cities' participation in the conspiracy. (Point III, *infra.*)

POINT I

The lower courts erred in limiting plaintiff's discovery.

Plaintiff comes to this Court 11 years after the filing of his complaint without having had any general discovery and without having received an answer to his complaint from defendants. Plaintiff has answered questions on oral deposition for thousands of pages, has voluntarily produced every document in his files and has opposed two motions for summary judgment. Rule 12, Fed. R. Civ. P., requiring defendants to answer within 20 days after the service of a summons and complaint, has been forgotten; rules 26 through 37, permitting discovery by "any party," have been read to mean discovery by any party except the plaintiff in this action; and rule 1, which requires that the federal rules "be construed to secure the just, speedy, and inexpensive determination of every action," has been ignored. In short, plaintiff has been treated differently from any other federal litigant.

When, after he and his associates had been exhaustively examined, plaintiff was granted discovery of Cities, the cry of "fishing expedition" was raised by Cities (Tr. Vol. III, 89) and was heeded by the district court, which ruled that, "The usual Federal rule permitting fishing expeditions will be curtailed." (Tr. Vol. I, 72a.) Before plaintiff had asked one question the court admonished him:

> "I tell you now in as plain English as I have command of, and in so doing I am reiterating what I said

in the memorandum, that I am not going to let the plaintiff in this kind of situation harass Cities Service." (Tr. Vol. III, 137.)

Compare the treatment plaintiff received with that promised federal litigants in the landmark case of *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947):

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

In a private antitrust conspiracy action, the need for liberal discovery rules is particularly compelling, not only because of the element of public interest in vigilant enforcement of the antitrust laws through private actions, *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955), but also because of the very nature of an antitrust conspiracy, in which, frequently, the only source of evidence of conspiracy open to a plaintiff is the conspirators themselves. *Cf. Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962).

Discovery by an antitrust plaintiff must be thorough. Proof of conspiracy is almost always circumstantial—a memorandum, a letter, a damaging statement on cross-examination, an unexplained act against self-interest and an anticompetitive result may make up the plaintiff's case. The crucial documents may be buried in far-flung files or be

in the hands of a co-conspirator. The plaintiff must be given the chance to bring them all together to prove his case. When the plaintiff is delayed in conducting discovery, so that memories fade and documents become mislaid, the need for thoroughness is even more crucial.

All of the defendants in this action are charged with having entered into one common conspiracy to boycott Iranian oil. Plaintiff has uncovered several instances of meetings which could have led to unlawful agreement between Cities and the other alleged conspirators; at one such meeting a boycott was openly threatened against Cities if it interfered in Iran. This Court has long recognized the futility of trying to understand a conspiracy by a disjointed examination of its separate members and their individual declarations. In a case involving a conspiracy to run a corner in cotton, this Court declared:

> "It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States* v. *Patten,* 226 U. S. 525, 544 (1913), citing *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45-46 (1904) and *Swift & Co.* v. *United States,* 196 U. S. 375, 386-87 (1905).

This statement continues to embody the Court's policy for the evaluation of evidence in antitrust conspiracy cases. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690 (1962). *Continental* involved a private treble damage action under §4 of the Clayton Act, alleging a conspiracy to violate §§1 and 2 of the Sherman Act. The Court held that the court of appeals erred in concluding that the evidence was insufficient to support a jury verdict

for plaintiff and that the verdict should have been directed for defendants. In remanding the case for a new trial, Mr. Justice White declared for the Court:

> "It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think that this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clear after scrutiny of each. '* * * [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U. S. 525, 544 * * *; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' *American Tobacco Co.* v. *United States,* 147 F.2d 93, 106 (C.A. 6th Cir.)." 370 U. S. at 698-99.

The rule of *Patten* and *Continental* follows the established principle that apparently innocent acts may be unlawful when viewed cumulatively with the overt acts of co-conspirators which may themselves appear equally innocent. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809 (1946); *Swift & Co.* v. *United States, supra,* at 396, citing *Aikens* v. *Wisconsin,* 195 U. S. 194, 206 (1904). This reasoning, commanding a total as opposed to a piecemeal view of the facts at trial, must, *a fortiori,* be applied to a motion for summary judgment at the pre-trial discovery stage.

Indeed, because of the dangers inherent in trying a case by affidavit where the facts are in the exclusive control of the moving party and its co-conspirators and the witnesses

and affiants are heavily motivated by self-interest in favor of the moving party, cases involving such circumstances should be brought to trial rather than be disposed of summarily, even though discovery may be complete. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962); *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 628 (1944); 6 MOORE, FEDERAL PRACTICE ¶56.15[5], at 2398 (2d ed. 1966).

The error of the courts below began not later than the order of February 11, 1958, signed by Judge Herlands. Plaintiff had already been barred from any discovery for nearly two years. At that point, after 62 days of testimony by plaintiff and unrestricted perusal of the documents of plaintiff and his associates, defendants could no longer seriously contend that they needed more information in order to answer or move against the complaint or that there was any legitimate reason to continue the stay of discovery. Continuance of the stay resulted in discrimination against plaintiff in favor of defendants, contrary to this Court's statement in *Schlagenhauf* v. *Holder*, 379 U. S. 104, 113 (1964):

> "Discovery 'is not a one-way proposition.' *Hickman* v. *Taylor*, 329 U. S. 495, 507. Issues cannot be resolved by a doctrine of favoring one class of litigants over another."

Discovery under the federal rules cannot mean that one side is to be strapped to a board while the other leisurely completes discovery of all the parties and witnesses it can think of.

Despite this seemingly elementary principle of justice, the district court denied plaintiff's motion to terminate his

deposition and favored defendants over plaintiff by continuing the stay of discovery against plaintiff until the completion of plaintiff's deposition and enlarging the stay to include the depositions of plaintiff's associates as well. Later, when plaintiff was permitted to take a deposition in aid of his opposition to Cities' motion for summary judgment, the court continued to favor defendants by forcing him to wait a year and a half until the defendants completed their depositions of nonparty witnesses before he could begin. As a result, plaintiff lost at least four important Cities witnesses by death. At this point plaintiff cannot know how many important witnesses employed by other defendants also may have died during the stay.

Having already delayed plaintiff's discovery insufferably, the district court proceeded to compound its error by restricting plaintiff's discovery of Cities to the point where an effective gathering of all of the facts became impossible. First, the court limited discovery to two subjects. After the record demonstrated that attorney Hill knew nothing about either plaintiff or Iran, the court permitted additional discovery of Cities, but it again restricted the discovery, this time in such a way as to eliminate any chance of conducting a normal deposition. The district court's final restriction on plaintiff's discovery was to cut it off entirely. The court denied plaintiff's motion for the production of documents and refused to permit plaintiff to examine the other defendants, even on the limited issue of Cities' role in the conspiracy.

The error of the courts below in limiting and restricting plaintiff's discovery was compounded in this action by the fact that it was done in the context of a motion for summary judgment. As a result, not only was plaintiff pre-

vented from discovering facts for himself but he was not even allowed to test fully and properly by cross-examination the facts put forth by the defendant.

When, before an antitrust plaintiff has had an opportunity to engage in discovery, the defendant moves for summary judgment on the ground that there is no merit to the plaintiff's claim, the plaintiff will often be unable to marshal in opposition to the motion all of the evidence which supports his claim, for much of that evidence is still within the exclusive possession of the defendants. Consequently, discovery in aid of the plaintiff's opposition to the motion must be permitted or the motion must be denied. As expressed by Professor Kaplan:

> "Under rule 56(f) the adversary need not even present the proof creating the minimal doubt on the issue of fact which entitles him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting that proof by affidavit in opposition to the motion." Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63 (II)*, 77 HARV. L. REV. 801, 826 (1964).

Recognizing the requirements of liberal discovery in antitrust actions, combined with liberal granting of rule 56(f) applications, several lower courts have concluded that summary judgment motions should be denied outright in private antitrust cases where pre-trial discovery is not complete, even where the plaintiff was unable to sustain the allegations of his complaint. *Mansfield* v. *General Artists Corp.*, 1967 TRADE CAS. ¶72,156 (S.D.N.Y. 1967); *Philco Corp.* v. *Radio Corp. of America*, 34 F.R.D. 453 (E. D. Pa. 1964); *Smith-Corona Marchant, Inc.* v. *American Photocopy Equip. Co.*, 217 F. Supp. 39 (S.D.N.Y. 1963). The

reasoning behind these decisions is plain: many times, an antitrust plaintiff will need to undertake the broadest possible discovery before he finally comes up with sufficient facts to make out his circumstantial case of conspiracy.

The general rule, as Professor Moore has summarized it, is that "The party opposing summary judgment must be given a reasonable opportunity to gain access to proof, particularly where the facts are largely within the knowledge or control of the moving party." 6 MOORE, FEDERAL PRACTICE ¶56.15[5], at 2397 (2d ed. 1966). If the purport of rule 56(e) is to place the burden of demonstrating a genuine issue as to a material fact on the party opposing summary judgment, as determined by the courts below, then the need is all the more compelling for the opposing party to have broad discovery in order to satisfy that burden.

Professor Moore states:

> "Rule 26(a) in providing that '*any party* may take the testimony of any person * * *' accords an equal right to all the parties to take depositions before trial." 4 MOORE, FEDERAL PRACTICE ¶26.06, at 1077 (2d ed. 1966) (emphasis in original).

Plaintiff was not accorded that right in his case against Cities. The right was first stayed, then limited and, finally, denied. Because the lower courts denied plaintiff his rights as a litigant and singled him out for discriminatory treatment, their judgment should be reversed.

POINT II

The lower courts erred in relieving Cities of the burden of demonstrating the absence of a genuine issue of fact on its motion for summary judgment and imposing the converse burden on plaintiff.

On any motion for summary judgment under rule 56, Fed. R. Civ. P., the moving party has the burden of positively and clearly demonstrating that there is no genuine issue of fact to be tried. *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 628 (1944). All inferences must be resolved against the moving party. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962). Summarizing the basic considerations applicable to summary judgment motions, Professor Moore states:

> "All reasonable doubts touching the existence of a genuine issue as to material fact must be resolved against the party moving for summary judgment.
>
> "It is not the function of the trial court at the summary judgment hearing to resolve any genuine factual issue, including credibility; and for purposes of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party, and the appellate court will do likewise in reviewing the trial court's grant of summary judgment. Discretion plays no real role in the grant of summary judgment: the grant of summary judgment must be proper under the above principles or the grant is subject to a reversal. The trial court may, however, exercise a sound discretion in denying summary judgment, appropriate to the case at hand, although the movant may have technically shouldered his burden." 6 Moore, Federal Practice ¶56.23, at 2856 (2d ed. 1966).

When the papers supporting a defendant's motion for summary judgment fail to deny the crucial allegations of the complaint, those allegations must be accepted as true. *Slagle* v. *United States*, 228 F.2d 673, 678 (5th Cir. 1956); *Woods Exploration & Prod. Co.* v. *Aluminum Co. of America*, 36 F.R.D. 107, 110 (S. D. Texas 1963); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544, 550 (E. D. Pa. 1962), *aff'd*, 310 F.2d 737 (3d Cir. 1962); *Long Island R.R.* v. *New York Cent. R.R.*, 26 F.R.D. 145, 147 (E.D.N.Y. 1960).

In addition, since the burden is on the moving party to demonstrate the absence of any genuine issue of fact and to show that the undisputed facts entitle him to summary judgment, it follows that the moving party must specify those undisputed facts. In *Long Island R.R.* v. *New York Cent. R.R., supra*, the court, in denying defendant's motion for summary judgment, stated the proposition as follows:

> "It is true that plaintiffs have failed to specify the facts which they contend to be in dispute, but the burden is upon the moving party to establish the facts with respect to which there is no dispute and not upon the other party to establish the facts that are in dispute. In other words, the defendant upon this motion has the burden of establishing the negative, and the plaintiffs do not have the burden of establishing the affirmative." 26 F.R.D. at 147.

Cities has never denied, by pleading or affidavit, the allegations of conspiracy set forth in the complaint. Instead, it submitted an affidavit by Hill, an attorney, who had knowledge of the Cities-Gulf contract for Kuwait oil and Cities' opportunity to participate in the Consortium but who was admittedly unfamiliar with Cities' Iranian venture and its

dealings with plaintiff. Hill's affidavits and the accompanying documents attempted to establish that neither Kuwait nor the Consortium were payoffs for joining the conspiracy (Tr. Vol. II, 146-411a). Hill never denied that Cities had joined the conspiracy, nor has any other officer of Cities ever filed an affidavit containing such a denial (*ibid.*). From 1960, when Cities moved for summary judgment, until his death in 1962, Jones, the one Cities executive who had personal knowledge of everything Cities did with respect to Iran, submitted no affidavit denying Cities' part in the conspiracy. He submitted no affidavit on any issue in the case, and plaintiff's attempts to depose him were tenaciously and successfully opposed by Cities.

Effective July 1, 1963, rule 56(e) was amended to add the following two sentences:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The notes of the Advisory Committee, *Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 621, 648 (1962), which recommended this change, explained that the purpose of the amendment was to overturn a line of cases in the Third Circuit in which properly documented motions for summary judgment were denied when an issue of fact was presented by the pleadings. The Advisory Committee's notes concluded with the statement that the amendment

was not intended "to affect the ordinary standards applicable to the summary judgment motion," and that, "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*" 31 F.R.D. at 648 (emphasis added). Thus, the Advisory Committee clearly stated its intention that the strict burden upon the moving party to establish the absence of any genuine issue as to a material fact was not to be disturbed.

Despite this clear statement of the purpose of the amendment, the language of the amendment drew a sharp dissent from Professor Moore, who expressed concern that the amendment would be more broadly construed than intended, so as to shift the burden of persuasion on a motion for summary judgment from the moving to the opposing party. MOORE'S MANUAL, FEDERAL PRACTICE AND PROCEDURE ¶17.10[3], at 1290-91 (1963).

Professor Moore's fear that the amendment would be used to alter the burden on summary judgment motions has been borne out in the present case. At the oral argument on plaintiff's motion for discovery on May 27, 1963, the court indicated that it might defer its decision at least until July, so that the proposed amendment to 56(e) would apply (R. 11802-03). The court did wait, for more than a year, until June 1964, when it used the 56(e) amendment to place the burden upon plaintiff, saying, "* * * plaintiff must—if he is to oppose successfully Cities Service's summary judgment—eventually submit 'specific facts' which 'would be admissible in evidence' [Rule 56(e)] * * *." (Tr. Vol. I, 58a.) No mention was made by the court of the fact that Cities had never, by affidavit or pleading, denied

that it had conspired against plaintiff. Instead, the court, without requiring Cities to satisfy the initial burden of demonstrating the absence of a genuine issue of fact, cast the burden upon plaintiff to show the existence of a genuine issue of fact. Moreover, while the court saddled plaintiff with this extraordinary burden it prevented him, in its order of July 9, 1964, from taking the full discovery needed to satisfy it. See pages 31-39, *supra*.

In its final opinion, that of September 8, 1965, the district court granted Cities' motion for summary judgment, finding that plaintiff had failed to meet "the new demands of Rule 56(e) * * *." (Tr. Vol. I, 10a.) The court said:

> "The crucial facts which plaintiff must produce in order to survive Cities' motion for summary judgment are evidentiary data tending to prove that Cities became a party to the alleged conspiracy." (Tr. Vol. I, 12a.)

In affirming, the court of appeals in effect adopted the position taken by the district court, shifting the burden to plaintiff, by noting:

> "After nine years* in the district court it is plain that the *plaintiff* has not established the existence of any 'genuine issue as to any material fact.'" (Tr. Vol. III, 174-75; emphasis added.)

The courts below have altered the standards to be applied to motions for summary judgment. They have ruled in effect that the 56(e) amendment shifted the burden on summary judgment motions so as to require the opposing

* The court may have thought plaintiff was conducting general discovery during this period, when, in fact, he was stayed. See p. 40, *supra*.

party to demonstrate the existence of an issue of fact and to relieve the moving party of the requirement of demonstrating the absence of an issue of fact. The result reached by the courts below plainly conflicts with that intended by the draftsmen of the amendment, who took pains to say:

> "Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. * * * When the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." 31 F.R.D. at 648.

Since the amendment became effective, other circuits have continued to require the moving party to establish the lack of a genuine issue of fact before the opposing party is required to set forth evidentiary data showing the existence of such an issue. *Underwater Storage, Inc.* v. *United States Rubber Co.*, 371 F.2d 950, 953 (D. C. Cir. 1966), *cert. denied*, 386 U. S. 911 (1967); *Associated Hardware Supply Co.* v. *Big Wheel Distrib. Co.*, 355 F.2d 114, 121 (3d Cir. 1966); *Scott* v. *Great Atlantic & Pac. Tea Co.*, 338 F.2d 661, 662 (5th Cir. 1964); *Jacobson* v. *Maryland Casualty Co.*, 336 F.2d 72, 74 (8th Cir. 1964), *cert. denied*, 379 U. S. 964 (1965). In rejecting the notion that the amendment to the rule cast a greater burden on the party opposing summary judgment, the court in *Susman* v. *South Texas Package Stores Ass'n*, 33 F.R.D. 340, 347 (S. D. Tex. 1963), said:

> "Defendant-wholesalers' positions apparently are that the italicized portion of the amended rule places a greater burden on plaintiffs than did the earlier version. The Court is of the opinion that defendants read

more into the rule than was intended. The comments of the Advisory Committee *expressly deny that the changes were designed to affect the ordinary standards applicable to the summary judgment motion.*" (Emphasis in original.)

In establishing the lack of a genuine issue as to a material fact, a party moving for summary judgment is subject to the rules of evidence. Rule 56(e), Fed. R. Civ. P. The failure to produce evidence which is in the control of the party failing to produce it leads to the "natural inference" that he is afraid of what the evidence will show, II WIGMORE ON EVIDENCE §285, at 162 (3d ed. 1940), and the same rule applies to witnesses, *id.* at §286.

The courts have recognized the applicability of these inferences to antitrust cases. The failure to produce at trial a witness "* * * who knew, or was in a position to know, whether in fact an agreement had been reached * * *," *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 225 (1939), has lead to the rejection of a defense that there was no conspiracy. In *Interstate Circuit* the defendants attempted to prove the absence of concerted action by producing people at a secondary level unfamiliar with the facts. These people could safely testify because they knew little or nothing. Affirming a finding of violations of the Sherman Act in such circumstances, Mr. Justice Stone declared:

"The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The pro-

duction of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton* v. *United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character." 306 U. S. at 226.

The present case, a private treble-damage antitrust action, is a classic example of the impropriety of placing the burden of proof upon the party opposing summary judgment. By failing to deny the allegation of conspiracy and taking issue only with plaintiff's allegations as to the precise inducements for its joining the conspiracy, Cities was able to avoid submitting the affidavit of Jones, the only man in its organization who knew all of the facts. If Cities had been forced to prove the absence of any material issue of fact with respect to the conspiracy, it would have had to submit an affidavit by Jones, and plaintiff's right to examine him could not then have been denied. Cities did not want Jones examined. It was still concealing the fact that Jones had conferred with Sandberg on his way to and from Iran; it was telling the court that Jones had not gone to Kuwait when, in fact, he had; and it was still covering up the fact that Jones had wrecked the aviation gasoline deal. When, finally, the court in 1964 permitted plaintiff to depose the executives who had some knowledge of Cities' Iranian plans, Jones was dead. Even then, the district court did not permit plaintiff to examine his papers. Cities was thus able to enjoy the full benefit, and plaintiff was forced to bear the consequences, of Cities' failure to produce the only man who could by affidavit or testimony deny the crucial material fact, conspiracy.

POINT III

There are genuine issues as to whether Cities joined the conspiracy.

While he did not have the burden of doing so (see Point II, *supra*), plaintiff, even without the benefit of adequate discovery, demonstrated the existence of fact issues requiring trial. For that reason, if for none other, it was error to grant summary judgment.

On the record as it now stands, there is substantial evidence that Cities formed the intent to join, and thereafter acted in furtherance of, the conspiracy to boycott Iranian oil. It is remarkable that, although the action has been pending for more than 11 years, the evidence that Cities joined the conspiracy is substantially uncontradicted. Rather than attempting to refute its participation in the conspiracy, Cities throughout the litigation has focused on the collateral, evidentiary issue of whether plaintiff has proved that Cities was paid off in Kuwait oil by the conspirators.

In June 1952, when plaintiff first met Frame and Lowe Cities owned less than one half of the production it needed; its shortage was 100,000 barrels per day. For years Cities had been searching for an independent oil supply. It had coveted Gulf's Kuwait oil fields. Through plaintiff, Cities was offered the opportunity to acquire an independent oil supply, available at a cost as low as any in the world and fully capable of meeting Cities' requirements and more. Hence, Cities was attracted to that

opportunity by the strongest possible self-interest and admits it: "We didn't know anywhere else in the world that the prospects looked that bright to us." (R. 10578.)

At the very outset of its negotiations with plaintiff, Cities was anxious to obtain an invitation to Iran to exploit the situation there through plaintiff's contacts. Cities actually drafted the invitation which was signed by Premier Mossadegh. There was nothing vague about Cities' intentions. It proposed to enter into a management contract into which plaintiff's contract would be merged. As soon as the invitation was received, Watson prepared a memorandum outlining in detail Cities' plans for the management company. He left no doubt that Cities was to be the prime mover: companies already having an interest in Middle Eastern oil were to be excluded. Within a matter of weeks, Cities had mobilized its senior management in an all-out effort to pursue the opportunity plaintiff offered it. Cities' chief executive officer and the heads of Cities' production, refining and foreign departments went on an expedition to Iran, where they were given carte blanche to inspect the country's oil facilities. They were sufficiently encouraged by their prospects to make a survey of the availability of tankers to carry the oil and to prepare a report intended for Premier Mossadegh suggesting two alternatives for reactivation of the Iranian oil industry, both of which opened the door for a major role for Cities. At a news conference just before leaving Tehran on September 18, 1952, Jones was confident of Cities' prospects. Whetsel recommended that Cities should help Iran follow the example set by Mexico in the nationalization of the Mexican

oil industry and "start the long, slow process of building up new markets." (R. 10429-30.)

In spite of its demonstrated interest and the feasibility of the project, Cities walked away from the deal. There is ample evidence from which the trier of the facts could infer that Cities' action, which contravened its apparent self-interest, was taken pursuant to an unlawful agreement. On August 6, 1952, A.I.O.C. invited each "oil company of repute" to refrain from any direct or indirect participation in Iranian oil. A.I.O.C.'s invitation, which was published in a newspaper advertisement for all to read, contained a thinly veiled threat that, should any concern participate in transactions involving Iranian oil, action would be taken against it. The attitude of the cartel companies was jarringly brought home to Jones at the American Petroleum Institute convention when he was stripped of his award as oil man of the year and was taken aside and threatened with a "disastrous" loss of his oil supply (R. 6338).

In addition to the American Petroleum Institute convention, numerous other contacts or opportunities for contacts between Jones and members of the cartel occurred. Jones spent five days in Holland with Sandberg who, Watson was quick to admit, had a connection with cartel member Royal Dutch/Shell. In deepest secrecy, Jones took a trip, hastily arranged by Watson after Jones had left for Iran, to Kuwait where the oil company is owned by cartel members A.I.O.C. and Gulf. Finally, Cities was in constant contact with Gulf during negotiations of the contract to purchase oil from Gulf, culminating in a personal conference between Jones and Gulf's chairman, Drake, when

Jones obtained a most-favored-nations clause for Cities on the eve of the execution of the contract.

A common purpose and plan may be inferred from a development and collocation of circumstances. *Glasser* v. *United States*, 315 U. S. 60, 80 (1942); see also, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698-99 (1962); *United States* v. *Patten*, 226 U. S. 525, 544 (1913).

In *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939), exhibitors of motion pictures had invited eight distributors to impose certain restrictions on the distribution of their films. The distributors argued that no conspiracy was shown inasmuch as the invitation had been addressed to each distributor individually, but this Court rejected that argument. The Court pointed out that:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan." 306 U. S. at 226.

Similarly, Cities knew that concerted action was contemplated and invited—it was advertised—and gave its adherence. *Interstate Circuit*, as noted earlier, *supra*, pp. 56-57, held that the defendants' failure to call as witnesses any of their officers or agents who knew whether an agreement for concerted action had been reached was "evidence of the most convincing character" of the existence of conspiracy. 306 U. S. at 226. The same inference arises from Cities' failure to call Jones. *Cf. Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 470 (1962), in which the Court

reversed a summary judgment for defendant on the ground, *inter alia,* that defendant's affidavits failed to negative the conspiracy.

It is, of course, immaterial whether the adherence to the illegal scheme was induced by promises or threats, such as those made to Cities by the cartel. See *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 376 (9th Cir. 1957); *Otto Miller Co.* v. *United Dairy Farmers Co-Op Ass'n,* 261 F. Supp. 381, 385 (W. D. Pa. 1966).

Cities did more than accept the invitation to join the boycott. It acted affirmatively to conform its business behavior to that of the members of the conspiracy, and to carry out the conspiracy's objectives. The Jones report to Mossadegh was shelved. Cities refused to deal with plaintiff. Jones wrote to Secretary of State-designate Dulles stating that "the only honorable solution" was agreement with the cartel (Tr. Vol. II, 394a). He volunteered the same advice to Attorney General-designate Brownell.

Whether Cities' contract with Gulf for Kuwait oil was the result of, or was bettered or speeded by, Cities' decision to join the conspiracy or was an act in furtherance of the conspiracy will not be known until plaintiff has had full discovery of Cities and its co-conspirators. Similarly, the entire import of Jones' quashing of the aviation gasoline transaction with the Air Force, an act that furthered the objectives of the conspiracy, must also await full discovery.

Proof of conforming behavior which has the effect of promoting the alleged conspiratorial purpose creates an issue of conspiracy which must be determined by the trier of fact. *Theatre Enterprises* v. *Paramount Film Distrib.*

Corp., 346 U. S. 537 (1954). How much stronger the case for a jury where, as in the instant case, plaintiff not only shows that defendant conformed its business behavior to that of the other conspirators, contrary to its immediate self-interest, but also adduces evidence of defendant's acts in furtherance of the conspiracy, without eliciting a denial from defendant!

This Court's holding in *Theatre Enterprises* was applied by the court in *Morton Salt Co.* v. *United States*, 235 F.2d 573 (10th Cir. 1956). The court there found that the action of one of the defendants, Deseret, in refusing, after conferring with the other defendants, to deal with an outsider was against Deseret's interest "unless it [Deseret] would benefit in other ways from this yielding to the demands of competitors." 235 F.2d at 578. "The natural inference is," the court continued, "that the action was pursuant to the conspiracy and Deseret believed that the long run benefit to it by helping maintain higher price levels was greater than this loss of raw salt business." *Ibid.* The similarity with the present case is obvious: Cities would have benefited greatly from the arrangement plaintiff proposed but chose, after conferring with other conspirators, to give up its immediate advantage. The same inference that the sacrifice was made in the interest of the conspiracy must be drawn.

In *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U. S. 839 (1962), the court touched on the essential consideration:

> "Many of the decisions in which courts find conspiracy on the basis of circumstantial evidence do so because

> the defendants acted in apparent contradiction of their own economic self-interest. In such cases there was evidence that the plaintiff had made a better offer than did those with whom the defendant was currently doing business, or that the plaintiff's place of business was superior to that supplied by the defendant." 297 F.2d at 206.

In summary, plaintiff raised an issue of fact as to Cities' participation in the conspiracy by adducing evidence that Cities, although anxious at first to accept the opportunity offered it by plaintiff, changed its course after conferring with several of the other alleged conspirators and thereafter, in contravention of its own immediate interests in the matter and in furtherance of the announced conspiratorial purpose, refused to deal with plaintiff and used its influence to frustrate some of plaintiff's attempts to dispose of his oil to others.

Plaintiff has succeeded in developing the foregoing facts in spite of a crippling stay of discovery which, after six years, was lifted only enough to allow a brief, limited examination of one of several members of the conspiracy. The conclusion of the courts below that there are no genuine issues as to material facts to be tried in plaintiff's case against Cities is contrary to even the limited record at plaintiff's disposal and was error.

Conclusion

The judgment dismissing the complaint as to Cities should be reversed and the action should be remanded to the district court with directions to deny Cities' motion for

summary judgment and permit plaintiff to engage in discovery proceedings to the full extent permitted by the Federal Rules of Civil Procedure.

Respectfully submitted,

WILLIAM E. KELLY
DAVID ORLIN
PREBEN JENSEN
ALAN R. WENTZEL

Counsel for Petitioner

Of Counsel:
CASEY, LANE & MITTENDORF
26 Broadway
New York, New York 10004

Counsel of Record:
WILLIAM E. KELLY
26 Broadway
New York, New York 10004

APPENDIX A

Rule 56, Federal Rules of Civil Procedure

Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine

issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.